

COMMUNICATION : C 2
C W 2 : APRIL 21, 2020
ITEM : 7

DATE: April 14, 2020

TO: Hon. Mayor and Members of Council

FROM: Wendy Law, Deputy City Manager, Administrative Services & City Solicitor

RE: **Draft Indemnification By-law**

At the Committee of the Whole meeting on March 9, the Committee deferred consideration of the Indemnification By-law to a later date. Comments received from Deputy Mayor Ferri on the draft Indemnification By-law were presented at Committee as a Communication. Staff have responded to these comments in the chart attached as Appendix 1 to this Communication. In consideration of those comments, staff are proposing further amendments to the draft Indemnification Bylaw, as attached to this Communication as Appendix 2.

For context, the following principles are applicable in considering the Indemnification Bylaw:

1. As noted in my report on March 9, 2020, the *Municipal Act, 2001* authorizes a municipality to act as an insurer and indemnify its current and former members of council and employees ("Indemnified Persons") for pecuniary risks and losses. The *Act* also authorizes the payment of expenses incurred by any Indemnified Persons. In short, the Indemnification By-law serves as an insurance policy for the Indemnified Persons, and it is, in essence, an insurance and financial bylaw. This means that the primary issue for Council to decide is **the extent** to which the City will pay for individuals' legal expenses.
2. The *Municipal Act* is largely permissive when it comes to indemnification, not mandatory. This means that the *Act* allows the City to indemnify individuals but, outside of the Integrity Commissioner, the City is not required to provide indemnification. The By-law confers a privilege, not a right.
3. The *Municipal Act* and *Municipal Conflict of Interest Act* set certain limits on when and how a municipality can provide indemnification. The City's Indemnification By-law must comply with these limits. In addition, to protect the City's taxpayers, the Indemnification By-law should have clear checks and balances as well as cost control measures, similar to other by-laws that authorize expenditures.

4. Payments under the Indemnification By-law are generally funded through two sources:
 - a. Insurance - this provides coverage for the majority of the City's litigation.
 - b. General operating budget – to provide for coverage on matters that are not covered by insurance.
5. Given that the City's insurer is paying for most of the expenditures arising out of the City's Indemnification By-law, it is recommended that the By-law reflect the principles contained in the City's insurance policies, where applicable, to ensure that the City's insurance coverage remains intact. Of course, there are instances where it may serve valid public policy objectives for the City to insure against pecuniary losses irrespective of the City's insurance policy coverage. The current draft Indemnification By-law provides for those instances as well, while generally ensuring that the City is aligned with our insurance policies.
6. The Indemnification By-law applies to all current **and** former Members of Council, employees, board members, and Integrity Commissioners. Indemnification allows the City to protect these individuals from harm in the event of a legal proceeding. However, the City also needs to be able to protect itself by retaining a certain level of discretion, and tools to manage both the reputational risks and financial risks posed by ongoing litigation.
7. In response to the concern that the draft by-law may lead to arbitrariness in decisions, as in administering all by-laws, it is a fundamental principle in municipal law that the administration be conducted in a fair and consistent manner. Failure to do so is subject to judicial challenges. As such, although it is not explicitly stated in the by-law, the requirement to avoid arbitrariness and maintain consistency is inherently applicable.

As such, it is staff's recommendation that Recommendation #1 in the Report from the Deputy City Manager, Administrative Services and City Solicitor on the Indemnification Bylaw Amendments dated March 9, 2020 be deleted and replaced with the following:

1. That the Indemnification By-law, substantially in the form as attached to this Communication from the Deputy City Manager, Administrative Services and City Solicitor dated April 14, 2020, be enacted.

Draft By-law Section	Deputy’s Mayor’s Requested Revision & Reasons	Staff Comments	Benchmarking Against Other Municipalities
<p>1(h) “Legal Proceeding” means:</p> <p>(i) a civil proceeding or administrative action, including but not limited to an action, application, motion, hearing, trial; or</p> <p>(ii) a proceeding wherein a person is charged with an offence under the <i>Criminal Code</i>, R.S.C. 1985, c. C. 46 or the <i>Highway Traffic Act</i>, R.S.O. 1990, s. H.8; or</p> <p>(iii) a proceeding brought under section 8 of the <i>Municipal Conflict of Interest Act</i>, R.S.O.1990, c. M. 50, as amended (the “MCIA”); or</p> <p>(iv) a Code Complaint; or,</p> <p>(v) a complaint to a professional association;</p> <p>But excludes:</p> <p>(i) any proceeding commenced by the Corporation;</p> <p>(ii) any proceeding in which the Corporation is a party adverse in interest;</p> <p>(iii) any proceeding where the Corporation’s and the Eligible Person’s interests conflict; or</p> <p>(iv) any proceeding under the <i>Municipal Elections Act</i>, 1996, S.O. 1996, c. 32, Sched., as amended.</p>	<p>Remove “But excludes” section in its entirety.</p> <p>The current section excludes the following from coverage:</p> <p>(i) any proceeding commenced by the Corporation;</p> <p>(ii) any proceeding in which the Corporation is a party adverse in interest;</p> <p>(iii) any proceeding where the Corporation’s and the Eligible Person’s interests conflict; or</p> <p>(iv) any proceeding under the <i>Municipal Elections Act</i></p> <ul style="list-style-type: none">There is no legal requirement to exclude any of the foregoing from coverage; <p>UNREASONABLE AND ARBITRARY LIMITATION OF COVERAGE:</p> <ul style="list-style-type: none">In my view, the proposed limitation of coverage is well beyond what is reasonable or acceptable. The purpose of the indemnification provisions of the Municipal Act is to protect eligible persons against loss due to action or inaction in carrying out their role in their capacity as an Eligible Person. This protection is not limited to only where their interests and the City’s interests are aligned, as you will see below. Rather, this section has the effect of deeming otherwise eligible persons ineligible based on a preconceived notion of guilt or wrongdoing which I cannot support;With respect to (i) above, I have been given to understand that this clause would have the effect of nullifying coverage for many Conflict of Interest proceedings. Respecting Conflict of Interest proceedings, the City through its integrity commissioner is now the one who may make an application against an employee – see section 223.4.1 (15) of the Municipal Act. Under this provision of the by-law, if the integrity commissioner started an application, it is doubtful that the employee would be covered, even if they are found not to have contravened, because this would be a proceeding commenced by the City. I believe that eligible persons must be covered no matter who commences the proceedings, to do otherwise would deem the eligible person to be in the wrong no matter the outcome of the proceeding – this is not just right. It would also stop councillors from being covered where the City commences a proceeding and the party who the City commenced the proceeding against, makes a third-party claim against an eligible person. My view is, we must provide coverage, no matter who commences the proceeding. This arbitrary limitation on coverage is unjustified.	<p>This definition, including the exclusion section, is in the current Indemnification By-law 91-2011, as amended. The only new addition is section 1(h)(iv) that relates to the <i>Municipal Elections Act</i>.</p> <p>In reviewing this section, staff agree that subsection (iii) could be removed and have made the change in the revised by-law. However, staff recommend that indemnification be subject to certain general exclusions/ limitations even where there is no mandatory legal requirement to exclude coverage. This would prevent situations where the City would be paying for legal fees and costs in situations where the interests of the individuals seeking indemnity and the corporation conflict, as further discussed below. It is ultimately a financial and public policy decision of Council.</p> <p>The exclusion as contained in subsection (i) is important. Without this exclusion, the City could be paying for both sides of the litigation. If the City initiates litigation against an individual for alleged wrongdoing, it should not be required to pay for the legal fees of that individual as a matter of course. It is staff’s recommendation that the City should only pay for the opposing litigant’s fees under direction of the court or specific consideration of council on a case by case basis.</p> <p>With respect to proceedings under the <i>Municipal Conflict of Interest Act</i> (MCIA), this section does not nullify coverage. The legislation provides that when the Integrity Commissioner makes an application to court, the proceeding is not initiated by the City but by the Integrity Commissioner. Consultation with the Integrity Commissioner confirmed same. The Integrity Commissioner does not seek instructions from Council to start the proceeding, nor does the Integrity Commissioner take instruction from Council on how the proceeding is conducted. This means that the exclusion in section (i) does not have the effect of nullifying coverage for MCIA proceedings. In fact, the definition of a legal proceeding specifically included MCIA proceedings, where there is no finding of a contravention. (This is in line with the provisions of the MCIA.)</p>	<p>All other municipal Indemnification By-laws reviewed include exclusions to coverage. For instance, Toronto, York Region, Mississauga, London and Caledon do not indemnify for legal fees in proceedings where the municipality has sued the individual. All municipalities included varying other exclusions.</p>

	<ul style="list-style-type: none">With respect to (ii) and (iii) above, these clauses may have the effect of nullifying coverage for many future proceedings. A good example is the current Miele claim against the City and many Councillors where the interests of the councillors in the action may not align with the City. This arbitrary limitation on coverage is unjustified.With respect to (iv) above, this section should only apply where the proceeding is commenced against the otherwise eligible person when the eligible person is not taking an action in their capacity as an employee or representative of the City. In which case, coverage should not be provided as the eligible person is not acting within their duties as an employee or representative of the City. This exclusion is not required as case law already makes this rule applicable <u>and section 2(1) implements this rule as the action complained of must be taken in his/her capacity as an Eligible Person, which you are not doing if the action was taken as a candidate rather than a councillor for example.</u> Alternatively, this section could be saved so long as subsections (i) – (iii) are deleted in their entirety.	<p>With respect to this comment, it is our respectful opinion that it would not be an arbitrary decision on eligibility but one that would require justification (a general municipal law principle in by-law administration). As noted above, we agree that subsection (iii) can be removed to avoid the uncertainty as identified, but we recommend that subsection (ii) stays to provide Council with the ability to refuse paying for litigation where the City’s interest may be adverse.</p> <p>Subsection (iv) is the only new addition in the proposed by-law to the definition and it was included to provide clarity and reflects current case law.</p>	
<p>Section 2(1)</p> <p>Subject to the provisions of this By-law, the Corporation shall indemnify an Eligible Person, and his or her heirs and legal representatives, in respect of any Legal Proceeding arising out of acts or omissions done or made by the Eligible Person:</p> <p>(a) in his or her capacity as an Eligible Person, including those acts or omissions arising from the performance of any statutory duty imposed by any general or special Act; and</p> <p>(b) acting in good faith and based on the reasonable belief that such acts or omissions were lawful and in the best interests of the Corporation or local board as applicable.</p>	<p>Delete the following:</p> <p>(b) acting in good faith and based on the reasonable belief that such acts or omissions were lawful and in the best interests of the Corporation or local board as applicable.</p> <p>BY-LAWS MUST BE <u>OBJECTIVE</u> NOT SUBJECTIVE:</p> <p>It is my understanding that, by-laws of this type are not permitted to be subjective in Ontario – whereas this section requires a subjective analysis of what was in the mind of the eligible person when the act complained of occurred.</p> <p>This by-law should not put any decision maker, and especially not an employee of the Corporation, in the position that they need to read into the mind of the eligible person. Should the City solicitor be standing in judgement of the eligible person? Is that fair to the City Solicitor?</p> <p>In this case, coverage is only provided if a decision maker makes the <u>subjective</u> determination that the eligible person thought that the act complained of was right without any facts or submissions by the eligible person – whereas, a decision of this type is required to be objective.</p> <p>DENIAL OF NATURAL JUSTICE AND PROCEDURAL FAIRNESS:</p> <p>If this section is to remain, natural justice and procedural fairness would require that the eligible person must be given the opportunity to make submissions on this issue – <u>this will complicate this process unnecessarily and bog down staff resources.</u></p>	<p>This requirement has been part of the City’s Indemnification By-law since 2011. In 2019, Council approved further amendments, which also included reference to this requirement. We recommend maintaining this section.</p> <p>This is a policy statement of Council in terms of what it is willing to indemnify for. It does not confer delegation of authority to the City Solicitor. In our respectful view, this statement is important as it releases the City of its obligation to pay for criminal, bad faith, or malicious behaviour of an Eligible Person, whether such is found by a court, tribunal or council. Please also note that criminal, bad faith and malicious actions and omissions are uninsurable.</p>	<p>The additional reference to the requirement to act in good faith was added in February 2019 to bring the City in-line with the requirements for indemnification included in other municipalities, particularly York Region. York Region does not provide indemnification where the individual “acted in bad faith” or the subject “actions or omissions were not within the individual’s good faith performance of his or her duties.”</p> <p>Most other municipalities reviewed also contain similar good-faith requirements. For instance, the City of Toronto does not indemnify its employees unless the acts in question were an “attempted performance in good faith of his or her duties”. Mississauga, Markham, London, Hamilton and Caledon all contain the requirement of “good faith” acts.</p>

	<p>IMPACT ON CITY RESOURCES:</p> <p>As it is proposed, this would require the City Solicitor to decide whether an action taken was in good faith. This would put him/her in a very precarious situation of judging the veracity of eligible persons intent – including the intent of members of council (who have power over her/his position). This is not a fair position to put the City Solicitor in. In addition, it would require the City Solicitor to review facts, hear submissions on the topic, and render a decision – this will have an impact on City resources which is not required or preferred.</p> <p>LIMITATION ONLY REQUIRED FOR COVERAGE OF INTEGRITY COMMISSIONER:</p> <p>The current by-law limits coverage to acts or omissions made in good faith and based on the reasonable belief that such acts or omissions were lawful and in the best interests of the Corporation. This limitation is only required to apply to the Integrity Commissioner and those officers who act under its instruction(s) pursuant to section 223.6(6) of the Municipal Act. However, in the current by-law, this section applies the limitation to all employees in all legal proceedings even though such limitation is not required.</p>	<p>Respectfully, we disagree with the need for making submissions and therefore bogging down staff resources. This is a policy statement of Council. If there is indication of bad faith, it will likely come out in the course of the proceeding. There is no decision authority conferred to the City Solicitor. In any event, denial of coverage under the Indemnification By-law is an important decision that would require clear justification to avoid a judicial challenge.</p> <p>Agreed that from a strictly legal perspective, there is no requirement of Council to include this limitation of indemnification. However, it is our understanding that this clause was introduced over a year ago to be consistent with other municipalities and to demonstrate the public policy objective of not indemnifying for bad faith behaviour. This is also consistent with general insurance policy coverage.</p>	
<p>Section 2(3) – (8)</p> <p>(3) If an Eligible Person qualifies for indemnification in a Legal Proceeding under this By-law, the City will assume carriage of the Legal Proceeding on behalf of the Eligible Person, unless the City Solicitor determines that the City cannot represent the Eligible Person. For greater certainty, the City shall not assume carriage of a Legal Proceeding referred to in 1(h)(iii) or 1(h)(iv) above.</p> <p>(4) Where the City Solicitor determines that the City cannot represent the Eligible Person, the City Solicitor may request that the Eligible Person retain independent legal counsel and be indemnified for legal fees in accordance with this By-law.</p> <p>(5) The City Solicitor shall have the right to request that an Eligible Person obtain their own legal counsel at any time during the course of the Legal Proceeding if the City Solicitor is of the opinion that it is no longer appropriate for the City to defend and represent, or to continue to defend and represent the Eligible Person.</p> <p>(6) Where the City</p>	<p>Delete sections 2(3)-2(8) in their entirety.</p> <p>This section means that an eligible person must be represented by the City unless the City Solicitor thinks the City cannot represent the eligible person.</p> <p>DENIAL OF NATURAL JUSTICE AND PROCEDURAL FAIRNESS:</p> <p>This denies the eligible person their fundamental right embedded in the law of procedural fairness and natural justice to choose their own lawyer. It will also bog down the resources of the City. Eligible persons must, in my opinion, be given the right to select the representation they believe best suits them and who has their best interests at heart.</p>	<p>These subsections are intended to ensure an appropriate level of litigation management and control when the City is paying for defences. We recommend keeping these sections in the proposed bylaw.</p> <p>Subsection (3) represents our general approach to insurance litigation defence. In our view, it is also the sensible approach to ensure that when the City is paying all costs of litigation, that it takes steps to avoid unnecessary increases in defence costs by involving multiple legal counsel, absent the existence of a clear conflict in representation.</p> <p>Legal counsel representing the City and other Eligible Persons have a professional duty to represent all parties fairly and completely. The representing lawyers (both internal and external counsel) owe a professional duty to represent all parties’ interests, not one to the exclusion of the other.</p> <p>Given that the City has the obligation to indemnify the Eligible Person – including any cost awards, it would automatically be in the City’s interest that the best defence is afforded to both the City and the Eligible Person. The reverse is not necessarily true, as the Eligible Person’s interest is strictly his/hers, and the City has less control over the defence while still having the obligation to pay. Ultimately, this is up to Council whether it wishes to diminish this control.</p> <p>Please also note that the City’s insurer has the right to select litigation counsel and the indemnified persons and the City have the obligation to cooperate or risk losing coverage. These are fundamental tenets of insurance coverage and this by-law is intended to ensure that the City’s insurance coverage is not diluted as a result of individual actions.</p>	<p>Similar sections are found in other municipal by-laws.</p> <p>In particular, the requirement for the City to assume the defence on behalf of an Eligible Person is a standard clause found in many Indemnification By-laws: York Region Toronto, Mississauga, Markham, Hamilton, Caledon, and London.</p> <p>The additional requirements for indemnification contained in sections 2(3)-2(8) are also found in other municipalities’ by-laws. For instance, the City’s draft indemnification By-law allows the City Solicitor to request an individual obtain their own legal counsel if there is a legal conflict. For comparison, the York Region By-law confirms that if a conflict of interest arises in a proceeding, the individual may retain their own counsel. The Regional Solicitor has “sole discretion” to make this decision, and his/her decision on the matter is final.</p>

<p>assumes the defence of a Legal Proceeding on behalf of an Eligible Person, the Eligible Person shall co-operate with the City and assist the City in the defence of the Legal Proceeding, as required by the City. This includes providing timely and fulsome responses to requests for information and attending the proceedings and meetings, as required.</p> <p>(7) Where an Eligible Person fails to co-operate and assist the City in accordance with section 2(6), the City Solicitor may determine that it would be inappropriate for the City to defend and represent, or continue to defend and represent, the Eligible Person, and the Eligible Person will no longer qualify for indemnification in respect of the Legal Proceeding.</p> <p>(8) If the City defends and represents the Eligible Person in a Legal Proceeding, the City shall not be responsible for any legal or other costs incurred by the Eligible Person unless such expenses have been pre-approved by the City Solicitor.</p>	<p>What if the eligible person is not happy with the representation or attention they are receiving from the City Solicitor? – In accordance with this section, they would be forced to continue to use the City Solicitor in their defence, or face not having coverage, this is unacceptable.</p> <p>INHERENT CONFLICT OF INTEREST AND IMPROPER ROLE OF THE CITY SOLICITOR:</p> <p>It is generally accepted that the City Solicitor must, in accordance with his/her rules of professional conduct, take in the interests of the <u>Corporation</u> over any eligible person. Therefore, in a vast majority of cases, there will be an inherent conflict of interest if the City Solicitor is charged with defending an eligible person in a proceeding because the City Solicitor’s <u>only</u> obligation is to the corporation.</p> <p>A good example is the current Miele claim where the City and many councillor’s interests are not aligned.</p> <p>COMPLICATION BECAUSE COUNCIL WILL DIRECT PROCEEDINGS:</p> <p>Since the City Solicitor must act in accordance with direction from council, Council will be conducting the proceeding.</p> <p>IMPACT ON CITY RESOURCES:</p> <p>This will also bog down resources in the City’s legal department for individual eligible persons whereas the focus of the City’s legal department must be in the furtherance of the <u>City’s</u> interests.</p> <p>REQUIRED SHARING OF INFORMATION:</p> <p>Pursuant to section 2(6) eligible persons are required to provide information to the City that they would otherwise only share with their personal representative. Eligible persons should not be required to share personal information with City staff in order to have coverage.</p>	<p>If an individual is unhappy with the representation that they are receiving, this can be discussed with the lawyers on the file and escalated to the City Solicitor or insurer to determine if the issues are such that separate representation is required. However, there can be many reasons why an individual is unhappy with the litigation approach, and the cause of such discontent may or may not be reasonable. While each file shall be reviewed on a case-by-case basis, in our view, it is important that the City maintain a general level of control in the management of litigation that it is paying for.</p> <p>Inherent conflict – this is the reason why there are instances when the City cannot represent an individual and separate representation is required (e.g. Code of Conduct complaints). Subsections (4) and (5) provide for that. For most litigation, the City and the Eligible Person have common interests. Also, the By-law provides coverage for pecuniary losses of the Eligible Person, which further solidifies the common interest. As a result, in most cases, it is appropriate for one set of counsel to act for both parties. In the Miele claim, where there is a conflict of interest, the individual defendants are represented by individual counsel.</p> <p>Staff can confirm that assuming the defence of a legal proceeding on behalf of an individual does not bog down the resources of the City. In most cases where an individual is named in a legal proceeding, the City of Vaughan is also named. This means that increase in workload to defend both parties is minimal. In contrast, coordinating multiple sets of counsel on a matter raises both legal costs and complications. Further, the insurer has the right to appoint counsel and may not always be willing to pay for multiple sets of counsel where representation by one lawyer is possible.</p> <p>Subsection (6) is important – we require the cooperation of the person receiving the benefit of a defence and indemnification to cooperate with the City to ensure that we can manage the litigation effectively. The duty to cooperate is also a fundamental basis to receive insurance coverage.</p>	<p>Section 2(6) requires an Eligible Person to cooperate in the defence of a Legal Proceeding. This section is intended to ensure that the lawyer defending the City and the Eligible Person have all necessary information required to advance a defence on behalf of the parties. This section is also standard across other Indemnification By-laws (York Region, Caledon, London, Toronto, Mississauga, Hamilton, Markham).</p>
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<p>Section 3(2)</p> <p>3(2) Upon receipt of a request for indemnification, the City Solicitor shall provide a written response within 10 business days of delivery of the request.</p>	<p>Revise section 3(2) as follows:</p> <p>Upon receipt of a request for indemnification, the City Solicitor shall provide a written response within 10 business days of delivery of the request. Coverage shall be provided if:</p> <p>(a) the requestor is an Eligible Person; and (b) the coverage requested is a proceeding.</p> <p>Otherwise, coverage shall be denied.</p> <p>BY-LAWS MUST BE <u>OBJECTIVE</u> NOT SUBJECTIVE:</p> <p>In my opinion, by-laws of this type cannot, and should not be subjective – and the current section requires a subjective analysis of what was in the mind of the eligible person when the act complained of occurred.</p> <p>BY-LAWS MUST BE CLEAR AND THE APPLICATION MUST BE REPEATABLE – THEREFORE CLEAR AND OBJECTIVE CRITERIA FOR COVERAGE MUST BE SET OUT:</p> <p>I believe that, Indemnification By-laws must have criteria and if met, coverage must be provided. In other words, anyone should be able to review the by-law and determine if they meet the pre-conditions for coverage. This is the case if the criteria to determine coverage is objective.</p> <p>My proposed revisions create an objective set of criteria that can be applied and will result in a repeatable outcome.</p>	<p>A similar section is found in the current Indemnification By-law as section 5. As our respectful opinion differs on the exclusion clauses, we do not recommend revising this section for the reasons as stated above.</p> <p>It is our respectful opinion that the By-law has the appropriate balance from an objectivity perspective. Section 3(2) is a written acknowledgement from the City Solicitor to confirm indemnification. The additional wording would only be applicable if Council wishes to expand the scope of indemnification as noted above.</p>	<p>Addressed above.</p>
<p>Sections 3(4)(a) and 3(5)</p> <p>3(4) Any Advance Payment made by the Corporation is subject to: (a) A cap of \$25,000 if the Advance Payment is not assumed or paid for by the Corporation’s insurer;</p> <p>3(5) If an Eligible Person wishes to seek Advance Payment for an amount exceeding \$25,000 as provided in section 3(4)(a), the City Solicitor shall bring a report to Council for direction.</p>	<p>Delete sections 3(4)(a) and 3(5) in their entirety.</p> <p>ARBITRARY CAP ON ONES RIGHT TO DEFEND THEMSELVES TO THE FULL EXTENT OF THE LAW:</p> <p>The proposed By-law caps the amount of indemnification to \$25,000.00. It seems to me that this is an arbitrary restriction on ones right to defend themselves, especially where their interests are not aligned with the City’s (for instance in the Miele Claim) to the full extent of the law in a proceeding and I understand that it is not required by law. Ones ability to defend themselves to the full extent of the law should not be determined by the City Solicitor or Council.</p> <p>For example, in Miele claim, damages can be substantial if allegations are found to be valid. What if the City chose to limit indemnification to a fraction of the amount needed to cover the cost damages? Should employees be put to this risk? Currently eligible persons could be liable for millions of dollars through no fault of their own.</p> <p>I agree that eligible persons should not be permitted to act unreasonably in their defence and therefore run up improper legal bills. I am given to understand that, this is best addressed through a referral of the bills to an independent person with the requisite qualifications/knowledge to determine if such legal expenses are appropriate. The courts in Ontario</p>	<p>We recommend keeping these sections in the proposed by-law.</p> <p>Please note that the \$25,000 cap is for Advance Payment, and not as a cap for overall litigation. And it is only applicable for matters not covered by the City’s insurer (e.g. Code of Conduct complaints).</p> <p>It is open to Council to increase this amount. Staff can provide the following context to inform Council’s decision:</p> <ul style="list-style-type: none">• The ability to allow advance payment up to \$25,000 was a consideration posed by the Integrity Commissioner in her Report to Council, dated February 11, 2020.• Until June 2019, indemnification for legal fees related to Code of Conduct investigations were limited to \$5,000.• As set out above, matters that are covered by the insurance company are not subject to the \$25,000 cap. The Miele claim is an insurance claim.• Relying on a Court Assessment Officer as the sole method of enforcing a budget will severely limit the City’s ability to manage legal expenses. Making an application to the Court Assessment Officer requires staff to obtain Council approval, prepare application	<p>Other municipalities also use spending “caps” as a method to control indemnification expenses. For instance, the City of Toronto limits indemnification for matters where a Member of Council is charged under a statute or sued in a civil proceeding to \$25,000. In the event the \$25,000 is spent before the legal matter is finished, further requests are referred to the Executive Committee for consideration and recommendation to Council.</p> <p>York Region also states that individuals may receive advance payment of legal fees for certain regulatory offences to \$15,000 and gives the Regional Solicitor sole discretion to determine whether advance payment is appropriate.</p> <p>The City of Mississauga requires the City Solicitor to seek direction from Council “to determine whether a cap should be imposed” if the City</p>

	<p>already have this function through a ‘Court Assessment Officer’. This is a fair and independent way to ensure that eligible persons do not unduly overcharge the City and will effectively reign in legal expenses.</p> <p>Section 5(6) ensures the City only pays reasonable legal costs as may be assessed by a Court Assessment Officer and the City will only be responsible for the amount found to be reasonable by this independent person with requisite expertise. Section 5(7) requires monthly invoices so the City Solicitor can determine the appropriateness of the amounts and can refer to the court assessment officer where required. This provides adequate protection for the City from run away legal fees.</p> <p>Section 3(5) is not required if section 3(4)(b) is deleted and therefore, it should be removed if section 3(4)(b) is removed.</p>	<p>materials, pay filing fees (approximately \$100), attend a hearing, etc. This is also complicated by the fact that applications to the Assessment Officer must be received within 1 month of receiving the bill, otherwise the City will be required to seek approval from a judge. While the Court Assessment Office is one tool to help manage legal spend, it is costly and ineffective as the sole tool.</p> <ul style="list-style-type: none">Ultimately it is up to Council to determine whether to advance more than \$25,000 prior to the decision being rendered. As noted in the proposed by-law, any requests for Advance Payment over \$25,000 shall be brought forward to Council for Council’s decision.	<p>Solicitor believes that the individual will require more than \$250,000 for indemnification.</p>
<p>Section 3(4)(b)</p> <p>3(4) Any Advance Payment made by the Corporation is subject to:</p> <p>(b) the requirement to reimburse the City, as set out in sections 5(2), 5(3), and 5(4); and</p>	<p>Revise section 3(4)(b) as follows:</p> <p>(b) the requirement to reimburse the City, as set out in sections 5(2), <u>and</u> 5(3), and 5(4);</p> <p>As will be discussed below, it is my opinion that section 5(2) is not appropriate as for the reasons set out. Therefore, reference to 5(4) should be deleted simply for to adjust for renumbering when section 5(2) is deleted.</p>	<p>This comment largely relates to section 5(2), which is addressed below.</p>	<p>Addressed below.</p>
<p>Sections 3(7) – 3(9)</p> <p>(7) A written request for indemnification referred to in Section 3.0(1) may include a request for approval of a lawyer chosen by the Eligible Person, or may request that the City Solicitor suggest three lawyers.</p> <p>(8) Where a request for indemnification seeks approval of a lawyer chosen by the Eligible Person, the response by the City Solicitor shall also:</p> <p>(a) approve the request to retain the lawyer chosen by the Eligible Person; or</p> <p>(b) deny the request and suggest three lawyers of the Corporation’s choice who could represent the Eligible Person in the Legal Proceeding at issue.</p> <p>(9) Where the City Solicitor has suggested three lawyers, the Eligible Person shall select from the list and shall notify the City Solicitor of the selection, within 5 calendar days of receipt.</p>	<p>Delete sections 3(7) – 3(9) in their entirety.</p> <p>This section gives the City Solicitor the right to determine who the eligible person chooses to defend him/her or to provide him/her with legal advice.</p> <p>DENIAL OF NATURAL JUSTICE AND PROCEDURAL FAIRNESS:</p> <p>This denies the eligible person their fundamental right embedded in the law of procedural fairness and natural justice to choose their own lawyer. Eligible persons must, in my opinion, be given the right to select the representation they believe has the requisite skill and knowledge, best suites them, and who has their best interests at heart.</p>	<p>These provisions are found in the current Indemnification By-law at section 6.</p> <p>As noted above, given the insurer’s right to appoint legal counsel, it is important that there is an ability to appoint counsel by the City. It is also our respectful opinion that it is in the City’s interest to have some level of control of legal counsel should the need arises. An Eligible Person’s request for counsel approval being rejected will be rare, as there is an obligation for the City to act fairly, but this section provides the City with appropriate protection should the need arise.</p> <p><i>Option for Code/MCIA proceedings:</i></p> <p>For proceedings where the City is not involved but which are subject to indemnification, such as Code of Conduct and MCIA proceedings, staff suggests that there is no need to obtain approval of legal counsel. Rather, there is only a requirement to ensure that the rates and invoices submitted are reasonable (e.g. commensurate with the experience/market rate of counsel and work conducted).</p> <p>Staff will make this amendment to the revised by-law.</p>	<p>Staff can confirm that the requirement for the City Solicitor to approve an individual’s legal counsel (which applies when there is a conflict between the City or when it would be inappropriate for the City to represent the individual) is standard in many Indemnification By-laws: York Region, City of Toronto’s Municipal Code, Mississauga, Markham, Hamilton, and Caledon. The City of London also requires that the individual be represented by the insurance company’s counsel in the context of insured claims.</p>
<p>Section 5(1)(a)</p> <p>5(1) The Corporation shall provide indemnification to an Eligible Person as follows under this By-law:</p>	<p>Delete section 5(1)(a) in its entirety.</p> <p>This section states that the City will assume carriage of the defence of the eligible person in a proceeding. I object to this section for the same reasons I</p>	<p>These comments relate to the Eligible Person’s ability to retain their own counsel and are addressed above.</p>	<p>Addressed above.</p>

<p>(a) Assume carriage of the defence on behalf of the Eligible Person or pay the actual and reasonable expenses of defending such Eligible Person in the Legal Proceeding; and/or,</p>	<p>object to section 3(7) – 3(9).</p> <p>DENIAL OF NATURAL JUSTICE AND PROCEDURAL FAIRNESS:</p> <p>This denies the eligible person their fundamental right embedded in the law of procedural fairness and natural justice to choose their own lawyer. I believe that eligible persons must, be given the right to select the representation they believe best suits them and who has their best interests at heart.</p>		
<p>Section 5(2)</p> <p>5(2) If it is determined in a Legal Proceeding that an Eligible Person’s acts or omissions giving rise to the Legal Proceeding did not:</p> <p>(a) arise out of acts or omissions done or made by the Eligible Person in his or her capacity as an Eligible Person; or</p> <p>(b) were not done or not made in good faith; or</p> <p>(c) were not based on the reasonable belief that such acts or omissions were lawful and in the best interests of the Corporation,</p> <p>the Eligible Person shall not be eligible for indemnification under this By-law, and shall be required to reimburse the Corporation for all funds paid on the Eligible Person’s behalf pursuant to this By-law within 90 days of such a determination.</p>	<p>Delete section 5(2) in its entirety.</p> <p>This section states expenses occurred in a Legal Proceeding will not be covered if it is determined that the act or omission giving rise to the Legal Proceeding <u>did not</u> [sic]: (b) were not done or not made in good faith; or (c) were not based on the reasonable belief that such acts or omissions were lawful and in the best interests of the corporation.</p> <p>It is my understanding that in most cases a court in a proceeding will not make this determination. In such a case – who would make the determination? Will the city take part in the hearing to request a court make such determination even where it is not relevant to the proceedings? This section should be removed for vagueness, for the potential financial impact on the City, and for mere impracticality.</p> <p>It is my belief that legal expenses incurred must be covered so long as such coverage does not offend the law. There is no requirement at law to provide for this limitation.</p>	<p>This section is similar to the sections noted above with respect to the obligation to act in good faith before indemnification is applicable. The discussions above apply. Please note that similar sections are also found in the current Indemnification By-law. In the current By-law, the City Manager, in consultation with the City Solicitor or designate, decides whether the Eligible Person’s acts were made in good faith or on the reasonable belief that the acts were lawful and in the best interest of the corporation.</p> <p>The <i>Municipal Act</i> and the MCIA set the rules for indemnification in municipalities. For indemnification to be allowed, the acts in question must have been properly done in the course of the individual’s official duties. This means that where an individual’s conduct is contrary to the performance of the individual’s duties, indemnification is not allowed. Bad faith acts, unlawful acts, and other actions are outside of an individual’s performance of their duties and should therefore not be eligible for indemnification. In our view, it further clarifies that such actions or omissions are outside of the Eligible Person’s capacity as a member or employee. As such, staff recommend that the above section should be kept in the By-law.</p> <p>Additionally, as discussed above, insurance companies will not provide coverage for actions taken in bad faith or criminal acts. This language is in line with our insurance coverage.</p>	<p>As discussed above, many other by-laws require that actions be taken in good faith for an individual to receive indemnification. For instance, York Region does not provide indemnification where the individual “acted in bad faith” or the subject “actions or omissions were not within the individual’s good faith performance of his or her duties.” As mentioned above, the City of Toronto’s Municipal Code, as well as By-laws from Mississauga, Markham, London, Hamilton, and Caledon all include “good faith” requirements.</p>
<p>Section 5(3)(c)</p> <p>5(3) An Eligible Person is not entitled to indemnification under this By-law and must reimburse the Corporation for any legal fees paid by the Corporation in respect of a Legal Proceeding if:</p> <p>(c) In the case of a Code Complaint, where a contravention has been found, unless:</p> <p>(i) the contravention has occurred by reason of inadvertence; or</p> <p>(ii) the contravention has occurred by reason of a bona fide error in judgment; or</p> <p>(iii) the referral of the matter is</p>	<p>This section states expenses occurred in defence of a code complaint will not be covered if the IC finds a contravention unless it is determined that the violation: (i) occurred through inadvertence; (ii) occurred by reason of a bona fide error in judgement; (iii) the referral was frivolous or vexatious, or (iv) where the investigation is stopped and investigation is terminated.</p> <p>Firstly, subsections 5([3])(c)(iii) and 5([3])(c)(iv) seem to be in error as these are circumstances where, by their very nature, no contravention of the code can be found so they must be deleted for that reason.</p> <p>Respecting subsections 5([3])(c) generally, it is my opinion that legal expenses incurred in defence of a code investigation must be covered, so long as such coverage does not offend the law. There is no requirement at law to provide for this limitation.</p>	<p>Please note that this section is proposed to reflect the eligibility considerations as put forward by the Integrity Commissioner in her report to Committee of the Whole (2) on March 9, 2020.</p> <p>Agreed – amendments to the proposed Indemnification By-law will be made accordingly.</p> <p>With respect to the general comment on 5(3)(c), technically there is no direct law that prohibits indemnification for violation of Code of Conduct. However, it is arguable whether a <u>deliberate</u> contravention of the Code of Conduct can be considered as an act within the Eligible Person’s capacity as a member of council or local board. All City employees and Members of Council and Local Boards are required to comply with</p>	<p>The City of Mississauga does not indemnify an individual for MCIA proceedings where the individual has been found not to have contravened the MCIA.</p> <p>The City of Markham also does not indemnify Members of Council where the member has contravened the Code of Conduct.</p>

<p>(iv) frivolous, vexatious or not made in good faith and the Integrity Commissioner dismisses the complaint without an investigation, or determines that there are no grounds or insufficient grounds for an investigation; or where it becomes apparent in the course of an investigation that there are insufficient grounds to continue the investigation, the Integrity Commissioner terminates the investigation and dismisses the complaint.</p>		<p>their respective Code of Conduct in performing their duties. If an individual has violated the applicable Code of Conduct and it was found that the violation was not done so by inadvertence or in error, an argument could be made that they have acted outside of the scope of their duties.</p>	
<p>Sections 5(5)(a) and 5(5)(c)</p> <p>The City Solicitor, acting reasonably, may request or impose one or all of the following:</p> <p>(a) Budgets for anticipated legal expenses; and/ or</p> <p>(b) Status Updates in respect of the progress of the proceedings; and/or</p> <p>(c) A limit on quantum of indemnification.</p>	<p>Delete sections 5(5)(a) and 5(5)(c) in their entirety.</p> <p>Current section allows City to set budgets capping legal costs.</p> <p>ARBITRARY CAP ON ONES RIGHT TO DEFEND THEMSELVES TO THE FULL EXTENT OF THE LAW:</p> <p>It seems to me that this is an arbitrary restriction on ones right to defend themselves, especially where their interests are not aligned with the City’s (for instance in the Miele Claim) to the full extent of the law in a proceeding and is not required by law. One’s ability to defend themselves to the full extent of the law should not be determined by the City Solicitor or Council. In this case, it is determined by the City Solicitor or Council because they have the right to deny financial coverage.</p> <p>For example, in the Miele claim, damages can be substantial if allegations are found to be valid. What if the City chose to limit indemnification to a fraction of the amount needed to cover the cost damages? Should employees be put to this risk? Currently eligible persons could be liable for millions of dollars through no fault of their own.</p> <p>I agree that eligible persons should not be permitted to act unreasonably in their defence and therefore run up improper legal bills. In my opinion, this is best addressed through a referral of the bills to an independent person to determine if such legal expenses are appropriate. I understand that the courts in Ontario already have this function through a ‘court assessment officer’. This is a fair and independent way to ensure that eligible persons do not unduly overcharge the City and will effectively reign in legal expenses.</p> <p>Section 5(6) ensures the City only pays reasonable legal costs as may be assessed by a Court Assessment Officer</p>	<p>These subsections are found in the current Indemnification By-law and are in accordance our general approach to litigation management.</p> <p>Staff agree that subsection (c) could benefit from a clarification that quantum of indemnification is in respect of <i>legal fees</i>, and the by-law will be amended accordingly.</p> <p>In terms of litigation budget, lawyers are routinely asked for budget in litigation and other matters – it allows for legal budgeting and assessment of the City’s financial exposure.</p> <p>These requirements (e.g. budgets and potential to limit indemnification) are a flow-through of the insurance company’s basic rights. Without these cost control mechanisms, the City/insurance company’s exposure to legal costs is dramatically increased, and insurance companies are unlikely to agree to insure the City if such broad exposure exists.</p> <p>It is important to note that all decisions regarding indemnification and budgets for legal matters must be <u>reasonable and in good faith</u>. If the City Solicitor arbitrarily denies indemnification or arbitrarily restricts legal budgets, that in itself is subject to another legal proceeding. Decisions about indemnification are therefore made based on reasonableness, fairness, principles of law, and with the understanding that improperly withholding indemnification will have negative consequences for the City.</p> <p>As discussed above, while the use of the Court Assessment Officer is one tool that is available to the City to control costs, if it is the only tool then the City will be unable to manage legal spend in cases where indemnification is provided. This would also not be acceptable to the insurer.</p>	<p>These types of provisions are also very common in Indemnification By-laws. For example, the York Region By-law states “The Regional Solicitor shall have the right to require and approve work plans, periodic budgets, status reporting and/or any other management of legal counsel that the Regional Solicitor deems to be appropriate.” As mentioned above, York Region also states that individuals may receive advance payment of legal fees for certain regulatory offences to \$15,000 and gives the Regional Solicitor sole discretion to determine whether advance payment is appropriate.</p> <p>The City of Toronto’s Indemnification Policy for Members of Council also provides cost control measures. The City of Toronto’s Municipal Code (which applies to indemnification of employees) confirms that "The City shall have the right to assess any account rendered by counsel acting for any employee in the defence of an action.”</p> <p>The City of Mississauga allows the City Solicitor to “set a reasonable global upset limit for legal costs” and also “establish reasonable hourly rates”. It also requires the City Solicitor to seek direction from Council if the indemnification of an</p>

	<p>and the City will only be responsible for the amount found to be reasonable by this independent person with requisite expertise. Section 5(7) requires monthly invoices so the City Solicitor can determine the appropriateness of the amounts and can refer to the court assessment officer where required. This provides adequate protection for the City from run away legal fees.</p>		<p>Eligible Person is expected to be over \$250K.</p> <p>The City of Markham also allows the City Solicitor to impose periodic budgets and workplans and review invoices.</p> <p>The Town of Caledon allows for a “reasonable global upset limit for legal costs” and for limits on hourly rates.</p> <p>The City of Brampton similarly provides the ability to reasonably limit indemnification expenses.</p>
<p>Section 5(6)</p> <p>5(6) If there is a dispute between the City Solicitor, acting reasonably, and the Eligible Person with respect to the account for legal expense payments, the City Solicitor may require that such account for reimbursement be assessed by a Court Assessment Officer prior to payment by the Corporation.</p>	<p>Add the following to the end of section 5(6):</p> <p>“The Corporation shall have the right to limit the amount which it will reimburse, or provide Advance Payment, to the amount arrived at by the Court Assessment Officer”</p> <p>This ensures that the City has the authority to limit reimbursements to the amount assessed by a Court Assessment officer. This strengthens the City’s control over runaway legal expenses.</p>	<p>Agreed, and this will be included in the revised by-law.</p>	<p>N/A</p>
<p>Section 6(1)(a)</p> <p>6(1) If an Eligible Person who has been approved to receive indemnification fails or refuses to comply with any of the provisions of this By-law, or in the event of one or more of the following:</p> <p>(a) the Eligible Person or his or her lawyer takes a step which is unnecessary, or otherwise prejudicial to the conduct of the Legal Proceeding, as determined by the City Solicitor; or</p>	<p>Delete section 6(1)(a) in its entirety.</p> <p>Current section allows City to set budgets capping legal costs.</p> <p>It appears to me that this section allows the City solicitor to deny coverage if the Solicitor does not agree with a legal step taken by the employee.</p> <p>This amounts to permitting the City solicitor to dictate legal steps taken. This section may be inappropriate as it may place the City solicitor in a conflict of interest (where the interests of the City and employee are not the same – for instance in the case of the Miele Claim), and may require the sharing of privileged legal strategy so the City Solicitor can determine the appropriateness of the action taken – this may require that the eligible person to reveal their legal strategy as sharing of this information may be determined to be a waiver of solicitor client privilege.</p> <p>Using the Miele claim as an example, the City Solicitor is required to defend its client (the City) and take all measures legally available to her to defend the City. If this by-law is passed as is, the City Solicitor would be permitted, by law, to limit the defence of the co-defendants by denying coverage of a legal step proposed to be taken which he/she believes is unnecessary, but which the lawyer hired to defend the eligible persons deems to be necessary. There is no appeal of this decision.</p>	<p>This section is currently found in the City’s Indemnification By-law. In our opinion, this section should remain in the by-law.</p> <p>This section is intended to ensure that Eligible Persons receiving the benefit of indemnification from the City do not take steps that are unnecessary or otherwise prejudice the City’s position. In our respectful opinion, this is critical to litigation management.</p> <p>In our respectful opinion, the City should not have to pay for unnecessary legal expenses, or to pay for lawyers who take positions that would cause the City to incur further costs by prejudicing the City in furtherance of an Eligible Person’s position. The intent of the Indemnification By-law is to protect the Eligible Person’s pecuniary losses; but it should not be done by exposing the City to further pecuniary losses that are unnecessary or inappropriate.</p> <p>An insurer may also refuse to pay for legal expenses that are unnecessary or prejudicial to their position, especially when they are paying for the Eligible Person’s legal expenses.</p> <p>For matters under insurance coverage, the insurance company has significant influence on the steps to be taken in a legal proceeding. If the suggested edits are adopted and an Eligible Person takes steps contrary to what the insurance company believes is necessary, it may deny coverage and the City may be required to pay for such steps out of pocket.</p> <p>Also as noted above, it is a fundamental principle that this by-law be administered in good faith and fairly. If the City acts unfairly or seeks to limit indemnification in bad faith, the City will be open to a</p>	<p>Such provisions are common in municipal indemnification By-laws.</p> <p>For example, the City of Markham confirms that Council may choose not to indemnify an individual if they “took a step which was unnecessary or otherwise prejudicial to the conduct of the covered action or proceeding”.</p> <p>The City of Mississauga will not pay costs, damages, expenses, etc. If the individual (or their counsel) took a “step which was unnecessary or otherwise prejudicial to the conduct of the Legal Proceeding, as determined by the City Solicitor”.</p>

		claim. As such, exclusions to indemnification are not imposed lightly and without reasons.	
<p>Section 6(1)(b)</p> <p>6(1) If an Eligible Person who has been approved to receive indemnification fails or refuses to comply with any of the provisions of this By-law, or in the event of one or more of the following:</p> <p>(b) the quantum of indemnification exceeds the Budget referred to in section 5(5); or</p>	<p>Delete section 6(1)(b) in its entirety.</p> <p>The current section allows the setting of limits to the City budget thereby capping legal costs.</p> <p>ARBITRARY CAP ON ONES RIGHT TO DEFEND THEMSELVES TO THE FULL EXTENT OF THE LAW:</p> <p>Again, this is an arbitrary restriction on ones right to defend themselves, especially where their interests are not aligned with the City's (for instance in the Miele Claim) to the full extent of the law in a proceeding and is not required by law. One's ability to defend themselves to the full extent of the law should not be determined by the City Solicitor or Council.</p> <p>I agree that eligible persons should not be permitted to act unreasonably in their defence and therefore run up improper legal bills. In my opinion, this is best addressed through a referral of the bills to an independent person to determine if such legal expenses are appropriate. The courts in Ontario already have this function through a 'court assessment officer'. This is a fair and independent way to ensure that eligible persons do not unduly overcharge the City and will effectively reign in legal expenses.</p> <p>Section 5(6) ensures the City only pays reasonable legal costs as may be assessed by a Court Assessment Officer and the City will only be responsible for the amount found to be reasonable by this independent person with requisite expertise. Section 5(7) requires monthly invoices so the City Solicitor can determine the appropriateness of the amounts and can refer to the court assessment officer where required. This provides adequate protection for the City from run away legal fees.</p>	<p>Please note that this is part of the current City's Indemnification By-law. This follows from the ability under the by-law to impose a limit of indemnification.</p> <p>Please see comments above.</p> <p>Please note that the Indemnification By-law does not limit one's ability to defend themselves in a court of law. Rather, it imposes a budget limitation on the spending such that the City will only be responsible up to a certain amount. This is similar to the City's insurance policy, which has a cap. Any claim that exceeds the coverage will be at the City's own expense.</p> <p>It is up to Council to decide whether it wishes to allow for indemnification without any quantum limits.</p>	<p>This section was part of the pre-existing Indemnification By-law. Examples of other By-laws which include budget requirements or limits on indemnification amounts are discussed above.</p>
<p>Section 6(1)(c)</p> <p>6(1)If an Eligible Person who has been approved to receive indemnification fails or refuses to comply with any of the provisions of this By-law, or in the event of one or more of the following:</p> <p>(c) the maximum amount of indemnification approved has been paid, or</p>	<p>Delete section 6(1)(c) in its entirety.</p> <p>The current section allows the setting of the City budget thereby capping legal costs.</p> <p>ARBITRARY CAP ON ONES RIGHT TO DEFEND THEMSELVES TO THE FULL EXTENT OF THE LAW:</p> <p>This is an arbitrary restriction on ones right to defend themselves, especially where their interests are not aligned with the City's (for instance in the Miele Claim) to the full extent of the law in a proceeding and is not required by law. Ones ability to defend themselves to the full extent of the law should not be determined by the City Solicitor or Council.</p> <p>I agree that eligible persons should not be permitted to act unreasonably in their defence and therefore run up improper legal bills. In my opinion, this is best addressed through a referral of the bills to an independent person to determine if such legal expenses are appropriate. The courts in Ontario already have this function through a 'court assessment officer'. This is a fair and independent way to ensure that eligible persons do</p>	<p>This is currently found in the City's Indemnification By-law and follows from the ability of the City to impose a cap on the indemnification. Please see staff's response above.</p>	<p>Please see above.</p>

	<p>not unduly overcharge the City and will effectively reign in legal expenses.</p> <p>Section 5(6) ensures the City only pays reasonable legal costs as may be assessed by a Court Assessment Officer and the City will only be responsible for the amount found to be reasonable by this independent person with requisite expertise. Section 5(7) requires monthly invoices so the City Solicitor can determine the appropriateness of the amounts and can refer to the court assessment officer where required. This provides adequate protection for the City from run away legal fees.</p>		
<p>Section 6(1)(d)</p> <p>6(1) If an Eligible Person who has been approved to receive indemnification fails or refuses to comply with any of the provisions of this By-law, or in the event of one or more of the following:</p> <p>(d) the Eligible Person commences a counterclaim, crossclaim, third party claim, application for judicial review, or other proceeding related to the Legal Proceeding for which reimbursement is sought, without first obtaining prior approval from the City Solicitor,</p> <p>then the Corporation shall not be liable to assume or pay any of the costs, damages, expenses, monetary penalty or other sums as set out in this By-law.</p>	<p>Delete section 6(1)(d) in its entirety.</p> <p>Requires City approval for an appeal, crossclaim, counterclaim, third-party claim, judicial review, etc.</p> <p>Eligible persons should not be required to get the consent of the City for these matters which are related to receiving the best defence possible.</p> <p>DENIAL OF PROCEDURAL FAIRNESS AND NATURAL JUSTICE:</p> <p>In order to ensure that justice is served, the eligible persons must be permitted to take all legal options they deem necessary in their own defence. To me this provision may act to effectively limit the options one can take. This arbitrary limit is unfair and not required.</p> <p>If the concern meant to be addressed is the legal fees, we can address this in the by-law through the ability to have the fees assessed by a Court Assessment Officer.</p> <p>POTENTIAL FOR CONFLICT:</p> <p>This section is inappropriate, may place the City solicitor in a conflict of interest (where the interests of the City and employee are not the same – for instance in the case of the Miele Claim), and may require the sharing of privileged legal strategy. If, for instance councillors were found to have offended the law in the Miele Claim, but the City was let off, the City Solicitor may be bound by her/his duty to the City to deny the councillors right to appeal, because any such appeal could open the City back up to being found to have been offside.</p>	<p>Section 6(1)(d) is found in the current City Indemnification By-law (the only addition is the reference to an application for judicial review).</p> <p>The principle of the Indemnification By-law is to protect against pecuniary losses of a person. In other words, it is intended to cover fees and awards arising out of a claim/proceeding against the Eligible Person (part of a defence). The initiation of appeals, judicial reviews, cross claims etc. are initiating processes. The Eligible Person takes on the position of the plaintiff or applicant/appellant. While counterclaim, cross claims and third-party claims can be effective as part of the overall defence, there should be consideration given to overall litigation management. Appeals and judicial review are initiating processes that are outside the scope of protection afforded in the Indemnification By-law. Council approval is required for those initiating processes.</p> <p>Decisions about appeals, counterclaims, etc. lead to significant financial implications for the City and its insurance company. It is important that due process is followed to ensure consistent and effective management of City resources. Council and the insurer (if applicable) must be made aware of the financial implications, and agree to incur such expenses, before any decisions are made.</p> <p>As mentioned above, these types of sections are also a flow through of the insurer's basic rights. The insurer has notification requirements included in policies, and often decisions about appeals, crossclaims, counterclaims, are made with the insurer's approval.</p> <p>Again, all decisions regarding indemnification must be made reasonably and in good faith. The City (and its insurer) must be able to make decisions about legal proceedings if the City/insurance company are bearing the cost.</p>	<p>These types of requirements are very common in municipal Indemnification By-laws. For instance, the York Region indemnification gives the Regional Solicitor sole discretion to determine whether an appeal should be commenced and whether the cost of the appeal will be borne by the Region.</p> <p>The City of London provides the City with the final authority to approve settlement for indemnified matters.</p> <p>The City of Markham also requires an individual to obtain approval from the City Solicitor before a counterclaim, crossclaim, third party claim, etc. is made.</p> <p>The City of Mississauga confirms it will not pay costs/damages for a matter if the individual or their counsel “initiated a counterclaim, crossclaim, third party claim, or other proceeding...”.</p> <p>The City of Toronto's Municipal Code states that all decisions about the defence of a proceeding (including decisions about counterclaims and third-party claims) shall be made by the City.</p>
<p>Section 7</p> <p>(7)Notwithstanding other provisions of this Bylaw, where a person seeks to appeal or bring an application for judicial review with respect to a judgment or decision in a Legal Proceeding covered by this By-law, the Corporation shall have the sole discretion to determine whether the</p>	<p>Delete section 7 in its entirety</p> <p>This amounts to permitting the City solicitor to dictate legal steps to taken.</p> <p>DENIAL OF PROCEDURAL FAIRNESS AND NATURAL JUSTICE:</p> <p>Ones ability to defend themselves to the full extent of the law should not be determined by the City Solicitor or Council. Under the MCIA, if a councillor is found to violate and wish to appeal the decision, the City Solicitor should not</p>	<p>This section is found in the current City Indemnification By-law.</p> <p>This section is written such that it is the <u>Corporation</u> (i.e. Council) that has the sole discretion to determine whether an appeal or judicial review will be covered by the by-law. The City Solicitor does not have any delegated authority under this section.</p>	<p>Addressed above.</p> <p>In addition, staff note that the City of Toronto's Municipal Code also confirms that the City shall have sole discretion to determine whether to represent an individual in an appeal and whether to pay related costs.</p> <p>Similarly, the City of</p>

<p>expenses of the appeal or judicial review will be covered by this By-law. If an individual pursues an appeal or application for judicial review without representation by the Corporation and is successful in that appeal, the Corporation shall have sole discretion to determine whether the Eligible Person shall be indemnified for his or her legal expenses.</p>	<p>have the right to deny coverage so the eligible person would be required to pay out of their own expense in order to defend themselves to the full extent of the law.</p> <p>POTENTIAL FOR CONFLICT:</p> <p>This section is inappropriate, may place the City solicitor in a conflict of interest (where the interests of the City and employee are not the same – for instance in the case of the Miele Claim), and may require the sharing of privileged legal strategy. If, for instance councillors were found to have offended the law in the Miele Claim, but the City was let off, the City Solicitor may be bound by his/her duty to the City to deny the councillors right to appeal, because any such appeal could open the City back up to being found to have been offside.</p>		<p>Markham retains the ability to determine whether an appeal should be commenced in a proceeding.</p>
<p>Section 8(2)</p> <p>8(2) Nothing in this By-law shall prevent the City Solicitor from bringing a report to Council to seek direction on any matter related to indemnification.</p>	<p>Revise section 8(2) as follows:</p> <p>“Nothing in this By-law shall prevent the City Solicitor or Member of Council from bringing a report to Council to seek direction on any matter related to indemnification.</p> <p>This allows a member of council to also bring a matter to council as required.</p>	<p>This amendment is not strictly necessary because members of Council always have rights to bring matters before Council. The only reason why this section is put in is to provide clarity that despite the authorization given in the by-law, the City Solicitor could seek direction from Council before exercising such discretion. Technically it is not required as notwithstanding any delegation of authority, the City Solicitor can bring a report to council to seek instructions any time, and the section was included only to provide clarity.</p>	<p>N/A</p>
<p>Section 10(c)</p> <p>This By-law comes into force on the day it is passed. For greater certainty:</p> <p>(c) For ongoing Legal Proceedings in which an Eligible Person was required to retain their own counsel, including Code Complaints filed with the Integrity Commissioner prior to the enactment of this By-law where a final disposition has not been rendered, the provision of this By-law will apply.</p>	<p>Revise 10(c) as follows:</p> <p>For ongoing Legal Proceedings in which an Eligible Person was required to retain their own counsel, including Code Complaints filed with the Integrity Commissioner prior to the enactment of this By-law where a final disposition has not been rendered, or where final accounts have not been settled, the provision of this By-law will apply.</p> <p>Extends coverage to those instances where final accounts have not been settled.</p>	<p>As this section only deals with ongoing Legal Proceedings, i.e. where there is no final disposition of the matter, there would not be any final accounts rendered. Final accounts would only be settled when the Legal Proceeding is complete and a final disposition is made, and that it is no longer “ongoing”. As such, we do not believe that the amendment is necessary.</p>	<p>N/A</p>

THE CITY OF VAUGHAN

BY-LAW

BY-LAW NUMBER XX-2020

A By-law to provide for the indemnity and defence of members of council, members of local boards, and employees of the Corporation against loss or liability incurred while acting on behalf of the Corporation, and to repeal By-law 91-2011, as amended.

WHEREAS Section 8 of the *Municipal Act, 2001*, S.O. 2001, c. 25 as amended, provides that the powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to govern;

AND WHEREAS Section 279(1) of the *Municipal Act, 2001*, as amended, provides that a municipality may, subject to certain limitations, act as an insurer and protect present and former members of council, local boards, employees, and officers from risk that may involve pecuniary loss or liability on the part of those individuals;

AND WHEREAS Section 283(1) of the *Municipal Act, 2001*, as amended, provides that municipalities may pay any part of the remuneration and expenses of the members of any local board of the municipality and the officers and employees of the local board;

AND WHEREAS Section 283(2) of the *Municipal Act, 2001* as amended, provides that a municipality may only pay the expenses of members of council, local boards, employees, and officers if the expenses are of those persons in their capacity as members, officers or employees, among other considerations;

AND WHEREAS Section 223.3(6) of the *Municipal Act, 2001*, as amended, provides that a municipality shall indemnify and save harmless the Integrity Commissioner or any person acting under the instructions of that officer for costs reasonably incurred by either of them in connection with the defence of a proceeding if the proceeding relates to an act done in good faith in the performance or intended performance of a duty or authority under Part V.1 of the *Municipal Act, 2001*, as amended, or a by-law passed under it or an alleged neglect or default in the performance in good faith of the duty or authority;

AND WHEREAS the Integrity Commissioner is authorized under sections 223.4 and 223.4.1 of the *Municipal Act, 2001* to conduct inquiries as it relates to the Code of Ethical Conduct for Members of Council and local boards and the *Municipal Conflict of Interest Act*;

AND WHEREAS Section 8 of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.

50, as amended, allows an elector, an Integrity Commissioner of a municipality or a person demonstrably acting in the public interest to apply to a judge for a determination of the question of whether a member, or former member, has contravened section 5, 5.1 or 5.2 of the *Municipal Conflict of Interest Act*.

AND WHEREAS Section 14 of the *Municipal Conflict of Interest Act*, provides that a municipality may pass a by-law to protect a member of council or of any local board thereof against any costs or expenses incurred by the member as a result of a proceeding brought under *Municipal Conflict of Interest Act*, and for paying on behalf of or reimbursing the member for such costs or expenses, so long as the member has been found not to have contravened that Act.

NOW THEREFORE the Council of The Corporation of the City of Vaughan enacts as follows:

Section 1 - Definitions and Interpretation

- (1) In this By-law, unless a contrary intention appears,
 - (a) “Advance Payment” means payment by the Corporation of actual and reasonable legal fees incurred by an Eligible Person in the course of defending the Legal Proceeding, in advance of a final disposition of the Legal Proceeding;
 - (b) “Code” means the Code of Ethical Conduct for Members of Council and Local Boards, as amended;
 - (c) “Code Complaint” means a formal or informal complaint made to the Integrity Commissioner, and includes an inquiry under section 223.4 or 223.4.1 of the *Municipal Act, 2001*.
 - (d) “Corporation” means The Corporation of the City of Vaughan;
 - (e) “City Solicitor” means the City Solicitor of the Corporation, or designate;
 - (f) “City Manager” means the City Manager of the Corporation, or designate;
 - (g) “Eligible Person” means any of the following persons of the Corporation:
 - (i) a current or former member of Council;
 - (ii) a current or former member of a local board;
 - (iii) the current or former Integrity Commissioner, including any person acting under the instructions of the Integrity Commissioner;
 - (iv) the current or former Lobbyist Registrar;
 - (v) current or former officers and employees.

(h) "Legal Proceeding" means:

- (i) a civil proceeding or administrative action, including but not limited to an action, application, motion, hearing, trial; or
- (ii) a proceeding wherein a person is charged with an offence under the *Criminal Code*, R.S.C. 1985, c. C. 46 or the *Highway Traffic Act*, R.S.O. 1990, s. H.8; or
- (iii) a proceeding brought under section 8 of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M. 50, as amended (the "MCIA"); or
- (iv) a Code Complaint; or,
- (v) a complaint to a professional association;

But excludes:

- (vi) any proceeding commenced by the Corporation;
- (vii) any proceeding in which the Corporation is a party adverse in interest; or
- (viii) any proceeding under the *Municipal Elections Act*, 1996, S.O. 1996, c. 32, Sched., as amended.

Section 2 - Indemnification of Eligible Persons

- (1) Subject to the provisions of this By-law, the Corporation shall indemnify an Eligible Person, and his or her heirs and legal representatives, in respect of any Legal Proceeding arising out of acts or omissions done or made by the Eligible Person:
 - (a) in his or her capacity as an Eligible Person, including those acts or omissions arising from the performance of any statutory duty imposed by any general or special Act; and
 - (b) acting in good faith and based on the reasonable belief that such acts or omissions were lawful and in the best interests of the Corporation or local board as applicable.
- (2) The Corporation shall reimburse members of Council and local boards for expenses incurred in obtaining legal advice to determine whether the member has a pecuniary interest in a matter which is the subject of consideration by council or a board.
- (3) If an Eligible Person qualifies for indemnification in a Legal Proceeding under this By-law, the City will assume carriage of the Legal Proceeding on behalf of the Eligible Person, unless the City Solicitor determines that the City cannot

represent the Eligible Person. For greater certainty, the City shall not assume carriage of a Legal Proceeding referred to in 1(h)(iii) or 1(h)(iv) above.

- (4) Where the City Solicitor determines that the City cannot represent the Eligible Person, the City Solicitor may request that the Eligible Person retain independent legal counsel and be indemnified for legal fees in accordance with this By-law.
- (5) The City Solicitor shall have the right to request that an Eligible Person obtain their own legal counsel at any time during the course of the Legal Proceeding if the City Solicitor is of the opinion that it is no longer appropriate for the City to defend and represent, or to continue to defend and represent the Eligible Person.
- (6) Where the City assumes the defence of a Legal Proceeding on behalf of an Eligible Person, the Eligible Person shall co-operate with the City and assist the City in the defence of the Legal Proceeding, as required by the City. This includes providing timely and fulsome responses to requests for information and attending the proceedings and meetings, as required.
- (7) Where an Eligible Person fails to co-operate and assist the City in accordance with section 2(6), the City Solicitor may determine that it would be inappropriate for the City to defend and represent, or continue to defend and represent, the Eligible Person, and the Eligible Person will no longer qualify for indemnification in respect of the Legal Proceeding.
- (8) If the City defends and represents the Eligible Person in a Legal Proceeding, the City shall not be responsible for any legal or other costs incurred by the Eligible Person unless such expenses have been pre-approved by the City Solicitor.

Section 3 - Process to Request Indemnification

- (1) If an Eligible Person is required to obtain their own legal representation pursuant to section 2, or if the Eligible Person is seeking to be reimbursed for legal expenses pursuant to section 2(2), he or she may make a written request for indemnification,
 - (a) to the City Solicitor; or,
 - (b) where the City Solicitor is the person seeking indemnification, to the City Manager; or
 - (c) where both the City Manager and the City Solicitor are named as parties in the legal proceeding giving rise to the request, to Council.
- (2) Upon receipt of a request for indemnification, the City Solicitor shall provide a written response within 10 business days of delivery of the request.

Advance Payment

- (3) A written request referred to in section 3(1) may include a request for Advance Payment of actual and reasonable legal fees. In the absence of such a request

for Advance Payment, payment of legal fees shall be made after a final disposition of the Legal Proceeding or the completion of the matter referred to in section 2(2) as appropriate (where a final disposition includes termination or settlement of a Legal Proceeding).

- (4) Any Advance Payment made by the Corporation is subject to:
- (a) A cap of \$25,000 if the Advance Payment is not assumed or paid for by the Corporation's insurer;
 - (b) the requirement to reimburse the City, as set out in sections 5(2), 5(3), and 5(4); and
 - (c) the condition that, if repayment of legal fees is required under this Bylaw, that repayment shall be made within 90 days of the final disposition of the Legal Proceeding.
- (5) If an Eligible Person wishes to seek Advance Payment for an amount exceeding \$25,000 as provided in section 3(4)(a), the City Solicitor shall bring a report to Council for direction.
- (6) If at any point the Eligible Person wishes to deviate from the repayment obligations to repay the City within 90 days, the Eligible Person shall make a request to the City Solicitor who shall bring the matter to Council to seek direction and approval.

Approval of Lawyer

- (7) A written request for indemnification referred to in section 3(1) may include a request for approval of a lawyer chosen by the Eligible Person, or may request that the City Solicitor suggest three lawyers.
- (8) Notwithstanding section 3(7), in the case of proceedings referred to in section 1(h)(iii) or 1(h)(iv), the Eligible Person shall not require approval of their lawyer by the City.
- (9) Where a request for indemnification seeks approval of a lawyer chosen by the Eligible Person, the response by the City Solicitor, acting reasonably, shall also:
- (a) approve the request to retain the lawyer chosen by the Eligible Person; or
 - (b) deny the request and suggest three lawyers of the Corporation's choice who could represent the Eligible Person in the Legal Proceeding at issue.
- (10) Where the City Solicitor has suggested three lawyers, the Eligible Person shall select from the list and shall notify the City Solicitor of the selection, within 5 calendar days of receipt.

Section 4 - Eligible Persons Served with Process

- (1) Subject to section 4(2), where an Eligible Person is served with any document which initiates a Legal Proceeding, he or she shall forthwith deliver the document to the City Solicitor.
- (2) Where a Member of Council or local board receives a Code Complaint the Member of Council or local board may request permission from the Integrity Commissioner to disclose the existence and general nature of the complaint to the City Solicitor in support of their request for indemnification under this By-law.

Section 5 - Manner and Extent of Indemnification

- (1) The Corporation shall provide indemnification to an Eligible Person as follows under this By-law:
 - (a) Assume carriage of the defence on behalf of the Eligible Person or pay the actual and reasonable expenses of defending such Eligible Person in the Legal Proceeding; and/or,
 - (b) pay any damages or costs, including any monetary penalty, or award against such Eligible Person as a result of a Legal Proceeding; and/or,
 - (c) pay, either by direct payment or by reimbursement, any expenses reasonably incurred by the Eligible Person as a result of a Legal Proceeding or a request for payment of fees under section 3; and/or,
 - (d) pay any sum required in connection with the settlement of a Legal Proceeding, provided that the City Solicitor approves the terms of the settlement;

to the extent that such costs, damages, expenses, monetary penalty, other award or other sums related to the Legal Proceeding are not assumed, paid or reimbursed under any provision of the Corporation's insurance for the benefit and protection of such person against any liability incurred by him or her.

- (2) If it is determined in a Legal Proceeding that an Eligible Person's acts or omissions giving rise to the Legal Proceeding:
 - (a) did not arise out of acts or omissions done or made by the Eligible Person in his or her capacity as an Eligible Person; or
 - (b) were not done or not made in good faith; or
 - (c) were not based on the reasonable belief that such acts or omissions were lawful and in the best interests of the Corporation,

the Eligible Person shall not be eligible for indemnification under this By-law, and shall be required to reimburse the Corporation for all funds paid on the Eligible Person's behalf pursuant to this By-law within 90 days of such a determination.

- (3) An Eligible Person is not entitled to indemnification under this By-law and must reimburse the Corporation for any legal fees paid by the Corporation in respect of a Legal Proceeding if:
 - (a) the Eligible Person is convicted of an offence in the case of a Legal Proceeding under section 1(h)(ii); or
 - (b) In the case of a proceeding brought under section 8 of the *MCIA*, the member of Council or local board has been found to have contravened section 5, 5.1 or 5.2 of the *MCIA*; or
 - (c) In the case of a Code Complaint, where a contravention has been found, unless:
 - (i) the contravention has occurred by reason of inadvertence; or
 - (ii) the contravention has occurred by reason of a bona fide error in judgment.
- (4) If an Eligible Person receives a payment through a costs award or settlement in respect of a Legal Proceeding for which the City has indemnified the Eligible Person, such amounts must be paid to the City upon receipt by the Eligible Person.
- (5) The City Solicitor, acting reasonably, may request or impose one or all of the following:
 - (a) Budgets for anticipated legal expenses; and/or
 - (b) Status Updates in respect of the progress of the proceedings; and/or
 - (c) A limit on quantum of indemnification for legal fees.
- (6) If there is a dispute between the City Solicitor, acting reasonably, and the Eligible Person with respect to the account for legal expense payments, the City Solicitor may require that such account for reimbursement be assessed by a Court Assessment Officer prior to payment by the Corporation. The Corporation shall have the right to limit the amount which it will reimburse, or provide Advance Payment, to the amount arrived at by the Court Assessment Officer.
- (7) The City Solicitor shall be provided with copies of the statements of account on a monthly basis, which shall outline all fees and disbursements, and shall be provided with information relating to these accounts, as may be requested from

time to time, in order to determine reasonableness of the account before any payment would be made.

Section 6 - Failure to Comply with By-law / Exclusions

- (1) If an Eligible Person who has been approved to receive indemnification fails or refuses to comply with any of the provisions of this By-law, or in the event of one or more of the following:
 - (a) the Eligible Person or his or her lawyer takes a step which is unnecessary, or otherwise prejudicial to the conduct of the Legal Proceeding, as determined by the City Solicitor; or
 - (b) the quantum of indemnification exceeds the Budget referred to in section 5(5); or
 - (c) the maximum amount of indemnification approved has been paid, or
 - (d) the Eligible Person commences a counterclaim, crossclaim, third party claim, application for judicial review, or other proceeding related to the Legal Proceeding for which reimbursement is sought, without first obtaining prior approval from the City Solicitor,

then the Corporation shall not be liable to assume or pay any of the costs, damages, expenses, monetary penalty or other sums as set out in this By-law.

Section 7 - Appeal

- (1) Notwithstanding other provisions of this Bylaw, where a person seeks to appeal or bring an application for judicial review with respect to a judgment or decision in a Legal Proceeding covered by this By-law, the Corporation shall have the sole discretion to determine whether the expenses of the appeal or judicial review will be covered by this By-law. If an individual pursues an appeal or application for judicial review without representation by the Corporation and is successful in that appeal, the Corporation shall have sole discretion to determine whether the Eligible Person shall be indemnified for his or her legal expenses.

Section 8 - Executive Acts Authorized

- (1) The City Solicitor is authorized to execute any necessary documents on behalf of the Corporation in order to give effect to this By-law according to its true intent and meaning.
- (2) Nothing in this By-law shall prevent the City Solicitor from bringing a report to Council to seek direction on any matter related to indemnification.

Section 9 – Repeal

- (1) By-law 91-2011, as amended, is hereby repealed.

Section 10 - Force and Effect

- (1) This By-law comes into force on the day it is passed. For greater certainty:
- (a) For ongoing Legal Proceedings where the Corporation has assumed the defence of the matter on behalf of an Eligible Person, the City will continue to defend the Legal Proceeding on the Eligible Person's behalf, subject to the terms of this By-law.
 - (b) For all Legal Proceedings where indemnification was authorized under Bylaw 91-2011, as amended, those existing indemnification approvals will continue under this By-law, and be subject to the terms of this By-law.
 - (c) For ongoing Legal Proceedings in which an Eligible Person was required to retain their own counsel, including Code Complaints filed with the Integrity Commissioner prior to the enactment of this By-law where a final disposition has not been rendered, the provision of this By-law will apply.

Enacted by City of Vaughan Council this 21st day of April, 2020.

Hon. Maurizio Bevilacqua, Mayor

Todd Coles, City Clerk

Authorized by Item No. 8 of
Report No. 17 of the Committee
of the Whole
Adopted by Vaughan City
Council on April 21, 2020